INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statement	2
Argument	5
Conclusion	9
Appendix A	11

CITATIONS

Cases:

Aircraft & Diesel Corp. v. *Hirsch*, 331 U. S. 752	7
Atlantic Trust Co. v. *Chapman*, 208 U. S. 360	9
Bosworth v. *Terminal Railroad Association*, 174 U. S. 182	6
Bowersock Mills & Power Co. v. *Joyce*, 101 F. 2d 1000	9
Bryan v. *Smith*, 174 F. 2d 212	8
Burnrite Coal Co. v. *Riggs*, 274 U. S. 208	9
Fahey v. *Mallonee*, 332 U. S. 245	1
Fahey v. *O'Melveny & Myers*, 200 F. 2d 420, certiorari denied, 345 U. S. 952, rehearing denied, 345 U. S. 978	1, 2, 3, 4, 8
Fahey, Ex parte, 332 U. S. 258	1, 8
Federal Land Bank v. *Bismarck Co.*, 314 U. S. 95	8
Federal Land Bank v. *Priddy*, 295 U. S. 229	8
Gompers v. *Bucks Stove & Range Co.*, 221 U. S. 418	7
Home Loan Bank Board v. *Mallonee*, 196 F. 2d 336, certiorari denied, 345 U. S. 952, rehearing denied, 345 U. S. 978	1, 2, 8
Home Mortgage Co. v. *Ramsey*, 49 F. 2d 738	9
Jones v. *Stewart*, 61 S. W. 105	6
Kelleam v. *Maryland Casualty Co.*, 312 U. S. 377	7

295456—54——1

Cases—Continued Page

Loeb v. *Willis*, 100 N. Y. 231 7
Mallonee v. *Fahey*, 14 F. R. D. 273 1
Mallonee v. *Fahey*, 117 F. Supp. 259 ..... 2, 3
McCormick v. *Puritan Coal Mining Co.*, 41 F. 2d 213 7
Minneapolis R. R. v. *Peoria Ry.*, 270 U. S. 580 7
Myers v. *Bethlehem Corp.*, 303 U. S. 41 7
Noxon Chemical Products Co. v. *Leckie*, 39 F. 2d 318, certiorari denied, *sub nom. Robb* v. *Noxon Chemical Products Co.*, 282 U. S. 841 9
Pusey & Jones Co. v. *Hanssen*, 261 U. S. 491 7
South Side Theatres v. *United West Coast Theatres Corp.*, 178 F. 2d 648 9

Statute:

National Housing Act of 1934, Section 405 (b) as amended (64 Stat. 259, 894, 12 U. S. C. (Supp. V) 1728) 8

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 659

ERNEST R. UTLEY AS RECEIVER, ETC., PETITIONER

v.

FAHEY, FEDERAL HOME LOAN BANK OF SAN FRANCISCO ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (T. R. 153)[1] is reported at 208 F. 2d 197. Earlier stages of this litigation which have been before this Court include *Fahey* v. *Mallonee,* 332 U. S. 245; *Ex parte Fahey,* 332 U. S. 258; *Home Loan Bank Board* v. *Mallonee,* 196 F. 2d 336, certiorari denied, 345 U. S. 952, rehearing denied, 345 U. S. 978; *Fahey* v. *O'Melveny & Myers,* 200 F. 2d

[1] T. R. refers to the typewritten volume, containing the proceedings had in the Court of Appeals, filed by petitioner in this Court.

420, certiorari denied, 345 U. S. 952, rehearing denied, 345 U. S. 978; see also *Mallonee* v. *Fahey,* 14 F. R. D. 273, and *Mallonee* v. *Fahey,* 117 F. Supp. 259.

JURISDICTION

The judgments of the Court of Appeals were entered on November 23, 1953 (T. R. 157, 158). A timely petition for rehearing, filed on December 23, 1953, was denied on December 28, 1953 (T. R. 159). The petition for a writ of certiorari was filed March 26, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a receiver may challenge an order directing his dismissal.

2. Whether, in the circumstances of this case, a receivership established in two consolidated proceedings can survive the complete dismissal of the first action and the dismissal of all the principal pleadings in the second one.

STATEMENT

This petition, like that filed in No. 656, is based upon the consolidated proceedings involved in *Home Loan Bank Board* v. *Mallonee,* 196 F. 2d 336 (Long Beach action) and *Fahey* v. *O'Melveny & Myers,* 200 F. 2d 420 (Los Angeles action), which were before this Court last term on petitions for certiorari (cf. Nos. 591–596, 658, Oct. T. 1952). We respectfully refer to the statement, in our Brief in Opposition filed in No. 656, this

Term, of the history of the Long Beach proceedings. The Los Angeles action, described in more detail in our Brief in Opposition in No. 592, Oct. T. 1952, involved an attempt to challenge the readjustment of the Federal Home Loan Bank districts of Portland and Los Angeles and their merger into the new Federal Home Loan Bank of San Francisco. In an appeal in that suit, occasioned by the award of attorneys' fees out of impounded funds, the Court of Appeals held that the District Court lacked jurisdiction *in personam* over indispensable parties and over the subject matter of that action and remanded the case with directions to dismiss. *Fahey* v. *O'Melveny & Myers,* 200 F. 2d 420, 481. This Court denied petitions for writs of certiorari, including one filed by petitioner (No. 594, Oct. T. 1952), 345 U. S. 952, and also petitions for rehearing, 345 U. S. 978.

Thereafter, the mandate issued by the Court of Appeals (*infra,* Appendix A, pp. 12–15) directed the dismissal of the principal pleadings in the Long Beach case (cf. our Brief in Opposition in No. 656, this Term) and the complete dismissal of the Los Angeles action.[2]

At the time the Court of Appeals issued its mandate there were pending before it two addi-

[2] While the District Court complied with the mandate as far as the Long Beach action was concerned, it refused to dismiss the Los Angeles action until the determination of the Master's application for fees proceedings here involved (cf. *Mallonee* v. *Fahey,* 117 F. Supp. 259, 270–273).

tional appeals (C. A. 9, Nos. 13411 and 13558) arising from this complex litigation. No. 13411 involved the appointment of a receiver for the limited purpose of bringing certain litigation (App.[3] 135–137); No. 13558 was occasioned by an order allowing the receiver costs and expenses to be paid out of the funds on deposit with the district court[4] (App. 151–154).

The events which led to the appointment of the receiver may be summarized as follows:[5] While the Conservator was in charge of Long Beach Savings and Loan Association, he had to borrow some $7,300,000, subsequently reduced to $6,300,000, from the Federal Home Loan Bank of San Francisco in order to weather a run on the Association. This loan was secured by a note, government bonds, and notes and mortgages executed by borrowers from the Association.[6] In 1952, the San Francisco Bank brought an action on the note against the Long Beach Association, which, however, denied that it was bound by the Conservator's signature. At the same time, the various plaintiffs in the consolidated actions (*i. e.*, the Long Beach and Los Angeles actions) urged that there were claims against the Conservator,

[3] App. refers to the Combined Appendix filed by petitioners in Nos. 656 and 659.

[4] For a description of the funds deposited with the court see *Fahey* v. *O'Melveny & Myers*, 200 F. 2d 420, 431–434, fn. 4.

[5] See also our Brief in Opposition in No. 594, Oct. T. 1952.

[6] Cf. our Brief in Opposition in No. 591, Oct. T. 1953, p. 13.

his bonding company, and the Federal Savings & Loan Insurance Corporation, arising from the Conservator's management of the Association, and that San Francisco had refused to bring those actions in spite of the impending expiration of the statute of limitations. The District Court appointed a receiver for the limited purpose of bringing such actions (cf. App. 135, par. 3).

After the Court of Appeals had issued its mandate (in May 1953) in the Long Beach and Los Angeles actions, respondents moved in the Court of Appeals for a remand of appeals Nos. 13411 and 13558, with directions to vacate the order appointing the receiver, to dismiss the pleadings filed by the receiver, or requiring the receiver to do so, and to vacate the order for the allowance of costs and expenses, and also directing the receiver's attorney to return $1,605.79 theretofore paid to him (T. R. 89–91).

The Court of Appeals granted the motions (T. R. 153). It held that since the two earlier decisions had established that the District Court lacked jurisdiction to maintain either of the two consolidated actions, the receivership, being of an ancillary nature, could not be maintained and its costs could not be charged to the funds in court.

ARGUMENT

Petitioner is a receiver whose appointment has been ordered vacated on the ground that the proceeding in which he had been appointed has

been ordered to be dismissed. The great bulk of the petition is devoted to an attempt to show that the Court of Appeals erred when it held that the Los Angeles and Long Beach actions could not be maintained. To this extent petitioner is merely seeking an untimely rehearing of the petition filed by him during the last term (cf. No. 594, Oct. T. 1952)[7] (in which he himself contended that the dismissal by the Court of Appeals of the action in which he was appointed had the clear effect of removing him and of terminating his authority to do anything further in the suits he had started).[8] We need not repeat our answers to the attack on the appellate decrees in the main actions, and the narrower issues pertinent to the present case certainly do not call for review.

1. At the very outset, petitioner is confronted with the jurisdictional obstacle that a receiver, being an arm of the court[9] cannot seek review of an order discharging or removing him. *Bosworth* v. *Terminal Railroad Association,* 174 U. S. 182, 189.[10] But even disregarding this initial bar-

[7] Note the virtual identity of the petition filed in No. 594, Oct. T. 1952, pp. 26–36, with pages 25–35 of the instant petition.

[8] See p. 2 of petitioner's reply to respondent's Brief in Opposition in No. 594, Oct. T. 1952.

[9] Upon appeal, the receiver becomes an arm of the appellate court. *Jones* v. *Stewart,* 61 S. W. 105 (Tenn.).

[10] A receiver, it is true, may appeal from an order disallowing him his commissions or fees. *Bosworth* v.

rier, petitioner cannot succeed. The dismissal of the entire Los Angeles proceeding and of the principal complaints in the Long Beach action annulled and rescinded, of necessity, all proceedings ancillary to the consolidated actions, regardless of whether the dismissal was for lack of jurisdiction or on the merits.[11] *Minneapolis R. R.* v. *Peoria Ry.*, 270 U. S. 580, 584; *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 451; *Loeb* v. *Willis*, 100 N. Y. 231. And these considerations apply with special force to a receivership, which is always ancillary and never an end in itself. *Kelleam* v. *Maryland Casualty Co.*, 312 U. S. 377, 380–381; *Pusey & Jones Co.* v. *Hanssen*, 261 U. S.

Terminal Railroad Association, *ibid.* The decision below, however, does not deprive petitioner of his right to be compensated; it merely holds that he may not be paid out of the receivership estate.

[11] Petitioner argues strenuously that, despite the statement of the Court of Appeals to the contrary, only the Los Angeles complaint was dismissed for lack of jurisdiction. Apart from the considerations that the receivership must fall if the complaints upon which it is based are dismissed for any reason and that the Court of Appeals is best equipped to determine whether it dismissed the complaints in the Long Beach case on jurisdictional grounds or on the merits (*McCormick* v. *Puritan Coal Mining Co.*, 41 F. 2d 213, 214 (C. A. 3)), the opinion of the Court of Appeals in the Long Beach case is plainly couched in jurisdictional language (cf. 196 F. 2d 336, at 370–371, 378–379, 383). The dismissal of the complaints was based upon the failure to exhaust administrative remedies, a jurisdictional ground. *Myers* v. *Bethlehem Corp.*, 303 U. S. 41, 48–49; *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752, 764.

491, 497; *Bryan* v. *Smith*, 174 F. 2d 212, 215 (C. A. 7).

2. The subsidiary nature of the receivership disposes of petitioner's argument that the further prosecution of the lawsuits filed by him would be in the interest of the Federal Home Loan Bank of San Francisco and its stockholders. There cannot be a receivership in the absence of supporting proceedings against the Federal Home Loan Bank. Moreover, the question whether or not an action should be brought is one entrusted to the discretion of the management of the Bank,[12] which is an instrumentality of the United States. Cf. *Federal Land Bank* v. *Priddy*, 295 U. S. 229, 331; *Federal Land Bank* v. *Bismarck Co.*, 314 U. S. 95, 102; *Fahey* v. *O'Melveny &*

[12] We submit that the San Francisco Bank properly abstained from bringing those actions. A suit against the Federal Savings & Loan Insurance Corporation would be unavailing, since its liability becomes due only in the event of a default by the insured institution. National Housing Act of 1934, Section 405 (b), as amended (64 Stat. 259, 894, 12 U. S. C. (Supp. V) 1728). As far as the Conservator and his bonding company were concerned, he had accounted to the satisfaction of the Home Loan Bank Board. (See our Brief in Opposition in No. 591, Oct. T. 1952, p. 37, fn. 72.) The authority of the Conservator to borrow $7,300,000 from the Federal Home Loan Bank of San Francisco, on behalf of the Long Beach Association, was beyond question after this Court, in *Ex parte Fahey*, 332 U. S. 258, 260, and the court below, in *Home Loan Bank Board* v. *Mallonee*, 196 F. 2d 336, 381, had upheld at least the interim status of the Conservator. See also *Fahey* v. *O'Melveny & Myers*, 200 F. 2d 420, fn. 4, at p. 434, certiorari denied, 345 U. S. 952, rehearing denied, 345 U. S. 978.

Myers, 200 F. 2d 430, 445–447, certiorari denied, 345 U. S. 952, rehearing denied, 345 U. S. 978.

3. Since the District Court lacked jurisdiction to entertain the petition for the appointment of the receiver, the cost of the receivership could not be charged to the estate. *Atlantic Trust Co.* v. *Chapman,* 208 U. S. 360, 373; *Noxon Chemical Products Co.* v. *Leckie,* 39 F. 2d 318 (C. A. 3), certiorari denied, *sub nom. Robb* v. *Noxon Chemical Products Co.,* 282 U. S. 841; *Home Mortgage Co.* v. *Ramsey,* 49 F. 2d 738 (C. A. 4); *South Side Theatres* v. *United West Coast Theatres Corp.,* 178 F. 2d 648 (C. A. 9). However, even if we assume for the sake of argument that the receivership failed because one of the underlying complaints was dismissed on the merits rather than for jurisdictional reasons, the court could properly determine that the cost of the receivership should be borne by the unsuccessful plaintiffs rather than by the estate. Cf. *Burnrite Coal Co.* v. *Riggs,* 274 U. S. 208, 214; *Bowersock Mills & Power Co.* v. *Joyce,* 101 F. 2d 1000, 1002–1003 (C. A. 8).

CONCLUSION

The decision below is correct. There is no conflict, and no problem of general importance is

involved. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL, 1954.

APPENDIX A

No. 12511

No. 12591

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Lodged May 25, 1953. Edmund L. Smith, Clerk
By (S) S. W. Stacey, Deputy Clerk

No. 12511

HOME LOAN BANK BOARD, ET AL., APPELLANTS

v.

MALLONEE, BUCKLIN AND FERGUS, ETC., ET AL., APPELLEES

and consolidated case

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, ET AL., APPELLANTS

v.

FEDERAL HOME LOAN BANK OF LOS ANGELES, ET AL., APPELLEES

No. 12591

JOHN H. FAHEY, ET AL., APPELLANTS

v.

O'MELVENY & MYERS, ET AL., APPELLEES

and

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, APPELLANT

v.

O'MELVENY & MYERS, ET AL., APPELLEES

MANDATE

UNITED STATES OF AMERICA, SS:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable, the Judges of the United States District Court for the Southern District of California, Central Division, Greeting:

Whereas, lately in the United States District Court for the Southern District of California, Central Division, before you or some of you, in consolidated causes between Mallonee, Bucklin and Fergus, et al, plaintiffs, third party plaintiffs and cross-claimants, and John H. Fahey, et al, defendants, Civil No. 5421–P. H.; and between Federal Home Loan Bank of Los Angeles, et al, plaintiffs, and Federal Home Loan Bank of San Francisco, et al, defendants, Civil No. 5678–P. H.; wherein an Order of Preliminary Injunction was duly filed, and entered on the 2nd day of December, 1949, and wherein an Order re allowance of attorneys' fees on account was duly filed and

entered on the 19th day of June, 1950; which said orders are of record and fully set out in said causes in the office of the Clerk of the said District Court, to which record reference is hereby made and the same is hereby expressly made a part hereof.

And whereas, the said John H. Fahey, et al, and said Federal Home Loan Bank of San Francisco have appealed to this Court as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Ninth Circuit by virtue of an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

And whereas, on the 1st day of May, in the year of our Lord, one thousand nine hundred and fifty-one, the said consolidated causes came on to be heard before the said United States Court of Appeals for the Ninth Circuit, on the said transcript of record, and was duly submitted.

And whereas, on the 6th day of May, in the year of our Lord, one thousand nine hundred and fifty-two, the said consolidated causes came on to be heard before the said United States Court of Appeals for the Ninth Circuit, on the said transcript of record, and was duly submitted.

And whereas, said actions were consolidated in the District Court for all purposes, and a review of decisions in both said appeals was sought by appellees upon consolidated petitions for writs of certiorari to the United States Supreme Court, which said petitions were denied on the 4th day of May, 1953:

On consideration whereof, It is now here ordered and adjudged by this Court that the said orders of the said District Court in these consolidated causes be and hereby are reversed and that said consolidated causes be and hereby are remanded to the said District Court with directions to:

1. Dismiss Civil Action No. 5678–P. H. at the cost of plaintiffs.

2. Dismiss the following pleadings in Civil Action 5421–P. H.:

(a) The complaint of Mallonee, Bucklin and Fergus, and all amendments and supplements thereto, at the cost of said complainants;

(b) The cross-claim and third party complaint of Long Beach Federal Savings and Loan Association, and all amendments and supplements thereto, at the cost of third party complainant and cross-claimant;

(c) The cross-claim of Federal Home Loan Bank of Los Angeles, and all amendments and supplements thereto at the cost of said cross-claimant;

(d) The cross-claim in interpleader of Title Service Company, and all amendments and supplements thereto, at the cost of said cross-claimant;

(e) The cross-claim in interpleader, and all amendments and supplements thereto, of Robert H. Wallis, at the cost of said cross-claimant;

3. Dissolve, set aside and vacate the order of said District Court entered the 13th day of March, 1948, insofar as the same requires Federal Home Loan Bank of San Francisco to deposit in the Registry of said District Court promissory

notes in the aggregate principal amount of $6,300,000.00, collateral securing the same and any other documents or property deposited by San Francisco Bank pursuant to said order; and return to Federal Home Loan Bank of San Francisco without charge or impairment said promissory notes, together with Government bonds in the face amount of $5,300,000.00 with all interest coupons attached thereto at the time of deposit and together with cash from the sum in the Registry of said Court sufficient to make the combined total sum of $6,324,098.35, with interest on $6,300,000.00 at 2% per annum from the 10th day of March, 1948 until the date of such release.

4. Set aside and vacate said order of preliminary injunction entered the 2nd day of December, 1949.

You, therefore, are hereby commanded that such proceedings be had in said consolidated causes, in conformity with the opinions and judgments of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeals notwithstanding.

Witness, the Honorable Fred H. Vinson, Chief Justice of the United States, the 21st day of May in the year of our Lord one thousand nine hundred and fifty three.

(S) PAUL P. O'BRIEN,
Clerk, United States Court of Appeals
for the Ninth Circuit.

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